LEWIS BRISBOIS BISGAARD & SMITH LLP
ALEX A. GRAFT, SB# 239647
E-Mail: Alex.Graft@lewisbrisbois.com
45 Fremont Street, Suite 3000
San Francisco, California 94105
Telephone: 415.362.2580
Facsimile: 415.434.0882

Attorneys for Defendant
ROBERT N. WEAVER, ESQ.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

CARL A. WESCOTT,

Plaintiff,

vs.

FREDERICK C. FIECHTER, IV; DAVID M. ZEFF, ESQ.; ROBERT N. WEAVER, ESQ. + DOES 1 through 25,

Defendants.

Case No. CV22-4288-AGT

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ROBERT N. WEAVER'S SPECIAL MOTION TO STRIKE (ANTI-SLAPP) PLAINTIFF'S COMPLAINT PURSUANT TO CAL. CODE OF CIVIL PROCEDURE § 425.16

Date: December 16, 2022
Time: 10:00 a.m.
Courtroom: A - 15th Floor
Magistrate Judge Alex G. Tse

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATE CASES

FEDERAL CASES

STATE STATUTES

FEDERAL STATUTES

I. INTRODUCTION

Plaintiff CARL A. WESCOTT ("Plaintiff"), already deemed a vexatious litigant under California Code of Civil Procedure §391(b), just does not seem to get it, as here he is again in this action, pursuing unmeritorious claims, including against Defendant ROBERT N. WEAVER ("Attorney Weaver"), Plaintiff's adversary in collection proceedings against Plaintiff. In fact, the present action is more than unmeritorious, but also SLAPP (the acronym for "strategic litigation against public participation") which is precluded under Code of Civil Procedure §425.16 ("anti-SLAPP statute")), as it is premised on Attorney Weaver's protected litigation conduct against Plaintiff. Like so many of his prior baseless actions, the present one also has no prospects of prevailing, and therefore, should be summarily dismissed under the anti-SLAPP statute.

It is well-settled that claims premised upon the exercise of protected activity—here, Attorney Weaver's litigation conduct—fall under the purview of the anti-SLAPP statute. Indeed, "the point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 193.) Yet Plaintiff's Complaint seeks to hold Attorney Weaver liable for representing his client in litigation adverse to Plaintiff, activity that is directly and unequivocally protected by the anti-SLAPP statute. Indeed, Plaintiff readily concedes that Attorney Weaver represented Defendant FREDERICK C. FIECHTER, IV ("Mr. Fiechter") "pursuing their client's debt collection via legal complaints" against Plaintiff, which is the predicate for Plaintiff's two causes of action in the Complaint for alleged violations of the Federal Debt Collection Practices Act ("FDCPA," codified at 15 U.S.C. §1692) and the Rosenthal Act, California Civil Code §1788, et. seq. (Complaint, paragraph 35.) The first prong under the anti-SLAPP statute is therefore met, shifting the burden to Plaintiff to produce competent, admissible evidence demonstrating a probability of prevailing.

He will never be able to do so for at least four distinct reasons: First, because Plaintiff fails to even allege a legally cognizable claim; second, the litigation privilege bars Plaintiff's claims; third, Plaintiff's claim is barred by the statute of limitations; and fourth, Plaintiff failed to obtain pre-filing permission under Civil Code §1714.10 relating to claims of alleged conspiracy with a

client. Because the activities on which Plaintiff's Complaint is based constitute protected conduct under the anti-SLAPP Statute, and Plaintiff cannot establish a probability of prevailing on his claims, Attorney Weaver respectfully requests that the Court grant his Anti-SLAPP motion.

II. FACTUAL BACKGROUND

This case arises from collection efforts by Attorney Weaver on behalf of a creditor client, Mr. Fiechter, against Plaintiff, who owes Mr. Fiechter well over $2.75 million comprised of two unsatisfied judgments. (Declaration of Robert Weaver ("Weaver Decl.", ¶ 3.) Attorney Weaver represented Fiechter in a bankruptcy and adversary proceedings against Plaintiff seeking a judgment determining the amount and dischargeability of Plaintiff's debt to Fiechter. (Id. at ¶¶ 3, 5, 6, 8; see also Complaint, ¶ 35.) Defendant David Zeff ("Attorney Zeff") served as counsel for Mr. Fiechter in his California collections action against Plaintiff. (Complaint, ¶¶ 3, 39.)

A. Underlying Facts

Attorney Weaver was initially retained in December of 2011 by Mr. Fiechter to assist attorney Guy Kornblum in addressing a Chapter 7 bankruptcy petition filed by Plaintiff and his spouse. (Weaver Decl., ¶ 4.) The month prior, Attorney Kornblum had filed an amended complaint against Plaintiff in civil court adding fraudulent conveyance claims to the collection action that had been filed on behalf of Mr. Fiechter. (Declaration of Alex Graft ["Graft Decl."], Exh. A.) In the course of his engagement, Mr. Weaver uncovered evidence of fraud on the part of Plaintiff which would support the basis for an adversary complaint establishing that the judgments obtained by Mr. Fiechter against Plaintiff were not dischargeable under 11 U.S.C. § 523. (Weaver Decl., ¶ 5.) But before he could file an adversary complaint on behalf of Mr. Fiechter on that basis, Plaintiff's bankruptcy petition was dismissed due to Plaintiff's failure to file the required schedules. (Graft Decl., Exh. B.)

Plaintiff again filed for Chapter 7 bankruptcy on January 17, 2012 ("Underlying Bankruptcy Action II"), prompting the subsequent filing of the adversary complaint by Attorney Weaver, properly alleging fraud on the part of Plaintiff, and seeking a determination that application of 11 U.S.C. § 523 required denial of bankruptcy discharge in favor of Plaintiff. (Exh. C to Graft Decl.) While the adversary complaint was pending, Attorney Weaver worked closely

with the bankruptcy trustee and his attorney, who filed their own adversary complaint against Plaintiff and later prevailed on summary judgment. (Weaver Decl., ¶ 6; Exhs. D and E to Graft Decl.) On May 1, 2013, judgment denying discharge was entered against Plaintiff. (Graft Decl., Exh. F; Complaint, ¶ 37.) Accordingly, since discharge was denied, the adversary complaint filed by Attorney Weaver was moot. (Weaver Decl., ¶ 7.)

Meanwhile, in the civil collection action, in which Attorney Zeff was now representing Mr. Fiechter, Plaintiff's counsel withdrew. (Graft Decl., Exh. G.) The withdrawal order provided two means of contacting Plaintiff—an email address and "San Pedro Sula, Honduras." (*Ibid.*) It also specified that the next hearing in the case was set in September 2013. (*Ibid.*) The September hearing was continued by court order to late November 2013, and notice was sent by the Court to Plaintiff at both the provided address in Honduras and to his former attorney, but not to Plaintiff's email address. (Exh. H to Graft Decl.) The Court repeatedly continued the case management conference through February 2015, until it set the case for trial on June 29, 2015. (Exh. I to Graft Decl.) In March 2015, Attorney Zeff filed a request for entry of default, which was served to San Pendro Sula, Honduras, and to a San Francisco, California P.O. Box. (Ibid.; Exh. J to Graft Decl.; see also paragraph 41 to Complaint.) The clerk entered the default on March 20, 2015, and a default "prove up" hearing was subsequent scheduled. (Id.)

Plaintiff did not appear for the "prove up" hearing and, after its finding of facts to support the judgment, the Court entered a default judgment of approximately $1.5 million against Plaintiff. (Exh. K to Graft Decl.) The Notice of Entry of Judgment was served on Plaintiff at the Honduras address, a San Francisco P.O. box, and via an email address supplied by Plaintiff on contemporaneously filed federal court records. (*Ibid.*) Plaintiff became aware of the entry of the judgment, as he filed a motion to vacate the judgment pursuant to Code of Civil Procedure § 473, on November 12, 2019, which was denied in a minute order entered December 3, 2019. (Exhs. L and M to Graft Decl.)

Plaintiff again filed for bankruptcy in 2016 ("Underlying Bankruptcy Action III") - neglecting to provide notice to his creditors - and was initially granted a discharge, but Attorney Weaver later arranged with an associated counsel, located close to the court where that bankruptcy

action had been filed, to vacate the discharge order. (Weaver Decl., ¶ 8; Exh. N to Graft Decl.) Collection, however, continued to present difficulties, as Plaintiff owed substantial amounts of spousal maintenance and child support as a result of Plaintiff's apparently contentious divorce through which he maintained that he lacked any assets. (Weaver Decl., ¶ 9.)

B. Plaintiff's Allegations Against Attorney Weaver

The only allegations which seem directed at Attorney Weaver is that he "advise[d] [Mr.] Fiecther to add allegations of fraud to his legal complaint to 'bankrupt-proof' his then-future-judgment" which "were false." (Complaint, ¶37, 38; see also ¶ 58 [in which Plaintiff characterizes his "largest source of harm . . . lay in [Mr.] Fiechter's false allegations of fraud."]; but see ¶ 12 of Weaver Decl.) Plaintiff asserts he lost a job as a result of a "fraudulent judgment for fraud" as his employer, SparkLabs, used the judgment as cover to fire Plaintiff for "whistleblowing" about SEC violations. (Complaint, ¶ 67.) In attempting to fit his claims within the debt collection statutes, he refers to "abusing the legal process" and points to the "resulting judgment" as "deceptive acts," as well as "later acts to bribe the law office of opposing counsel to steal confidential and privileged information were further such deceptive acts.[1]" (Complaint, ¶ 79.)

Of course, it cannot be disputed that it is Plaintiff who regularly uses legal process to harass, and has been declared a vexatious litigant by the San Francisco Superior Court pursuant to the Section 391 of the California Code of Civil Procedure for abuse of process and harassing litigation. (Exh. A to Weaver Decl. [California Vexatious Litigant List Excerpt, retrieved November, 2022].) Plaintiff has also filed no less than twenty-five cases in federal and state courts throughout the country since January 2021 (Weaver Decl., Exh. B.)

III. REQUEST FOR JUDICIAL NOTICE

Pursuant to Federal Rules of Evidence, Rule 201, Attorney Weaver requests that the Court take judicial notice of the following Court documents for the purpose of this Motion. (See, *Branch v. Tunnell* (9th Cir. 1994) 14 F.3d 449, 454.) These documents are attached to the Declaration of

[1] The latter aspect of that claim lacks any context. Its blamed on "Defendants" but no actual facts are alleged which explain what Plaintiff means. Needless to say, Attorney Weaver did not "bribe" anyone and there are no facts pled that he did.

Alex A. Graft ("Graft Decl."), filed concurrently herewith:

Exhibit A: Third Amended Complaint, filed November 1, 2011, in San Francisco Superior Court, Case No. CGC-10-496091 ("San Francisco Action");

Exhibit B: Order dismissing bankruptcy petition in United States Bankruptcy Court, Northern District of California, Case No. 11-34426 DM7 ("Underlying Bankruptcy Action");

Exhibit C: Adversary Complaint filed by Attorney Weaver in United States Bankruptcy Court, Northern District of California, Case No. 12-30143 DM ("Underlying Bankruptcy Action II");

Exhibit D: Adversary Complaint filed by the bankruptcy trustee in the Underlying Bankruptcy Action II;

Exhibit E: Summary Judgment Order in Underlying Bankruptcy Action II;

Exhibit F: Judgment denying discharge entered in Underlying Bankruptcy Action II;

Exhibit G: Order authorizing withdrawal of counsel in San Francisco Action;

Exhibit H: Order continuing case management conference in the San Francisco Action;

Exhibit I: Excerpt of the register of actions in the San Francisco Action;

Exhibit J: Request for default filed in the San Francisco Action;

Exhibit K: Notice of entry of default judgment in the San Francisco Action;

Exhibit L: Plaintiff request to set aside the judgment entered in the San Francisco Action, and supplemental briefing;

Exhibit M: Order denying request to set aside the default judgment entered in San Francisco Action;

Exhibit N: Judgment vacating discharge order in United States Bankruptcy Court, Northern District of California, Case No. 16-10975 HLB7 ("Underlying Bankruptcy Action III").

IV. LEGAL ARGUMENT

A. The Anti-SLAPP Statute Applies to Plaintiff's Claims Against Attorney Weaver

1. The Anti-SLAPP Statute Generally

In 1992, the California Legislature enacted the anti-SLAPP statute in order to combat

increasing use of lawsuits designed to chill "a party's constitutional right of petition." (*State Farm General Ins. Co. v. Majorino* (2002) 99 Cal. 4th 974, 975.) Commonly, "SLAPP suits are brought to obtain economic advantage over the defendant, not to vindicate a legally cognizable right of the Plaintiff." Id. at 1126 (citing *Wilcox v. Superior Court* (1994) 27 Cal. App. 4th 809, 815-816.

The elements for a special motion to strike under § 425.16 are set out as follows:

> (b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
>
> (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
>
> (3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of the determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be effected by that determination in any later stage of the case or in any subsequent proceeding.

The California Legislature has defined the activities protected by the anti-SLAPP statute, which includes "any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" as well "as any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" or "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Code Civ. Proc. § 425.16(e)(1)(2) and (4).

Moreover, section 425.16 was amended in January 1997 to prevent conflicting interpretations of the statute issued by the appellate courts. The Legislature stated that henceforth the statute "**shall be construed broadly**." (Cal. Code Civ. Proc. § 425.16(a) (emphasis added); see also *Rohde v. Wolfe* (2007) 154 Cal. App. 4th 28, 35 ["[S]tatements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute, and that statute does not

require any showing that the litigated matter concerns a matter of public interest"].)

2. An Anti-SLAPP Motion May be Brought in Federal Court

The court in *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127 (N.D. Cal. 1999), determined an anti-SLAPP statute applied in federal court:

> With respect to the applicability of the anti-SLAPP statute to claims filed in federal court, the Court turns to a recent decision from the Ninth Circuit, *United States v. Lockheed Missiles and Space Co., Inc.*, 171 F.3d 1208 (9th Cir.1999), in which the Ninth Circuit held that the statute was applicable to state law counterclaims asserted in a federal diversity action. The Court concluded that application of the statute to such claims would not result in a 'direct collision' with the Federal Rules. The Court went on to perform an *Erie* analysis, concluding that important substantive state interests are furthered by the anti-SLAPP statute, that no identifiable federal interest would be undermined by applying the anti-SLAPP statute in diversity actions. . . The *Erie* doctrine applies to pendent state law claims to the same extent it applies to state law claims before a federal court on the basis of diversity jurisdiction. See *Nathan v. Boeing Co.*, 116 F.3d 422, 423 (9th Cir.1997).

Accordingly, it appears under the *Erie* analysis set forth in *Lockheed* the anti-SLAPP statute may be applied to state law claims which, as in this case, are asserted pendent to federal question claims. (*Id.* at 1129-1130; accord *Vess v. Ciba-Geigy Corp. USA* (9th Cir. 2003) 317 F.3d 1097, 1109 ["Motions to strike a state law claim under California's anti-SLAPP statute may be brought in federal court."].)

B. Attorney Weaver has Met His Burden Under Anti-SLAPP First Prong

Under the anti-SLAPP statute, a defendant carries the initial burden to show that the plaintiff's suit "arises from an act in furtherance of the defendant's rights of petition or free speech." (Cal. Code Civ. Proc. § 425.16(b)(1); *Vess*, 317 F.3d at 1110.) "The defendant need not show that the plaintiff's suit was brought with the intention to chill the defendant's speech; the plaintiff's 'intentions are ultimately beside the point.'" (*Vess*, *supra.* at 1110 (quoting *Equilon Enters., LLC v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 67).

As noted above, an "act" covered by the anti-SLAPP statute includes (1) "any written or oral statement or writing made before a . . . judicial proceeding, or any other official proceeding authorized by law; [or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding

authorized by law." (Cal. Code Civ. Proc. § 425.16(e)(1) & (2).) Under Section 425.16(e)(1) and (2) therefore, "all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute." (*Cabral v. Martins* (2009) 177 Cal. App. 4th 471, 480; see also *Rusheen v. Cohen* (2006) 37 Cal. 4th 1048, 1056 [anti-SLAPP statute protects "communicative conduct such as the filing, funding, and prosecution of a civil action," including such acts when "committed by attorneys in representing clients in litigation"].) It is, in fact, well-settled that claims based on "litigation activity" are subject to the anti-SLAPP statute. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 648, emphasis added ["A cause of action 'arising from' defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike."].) The anti-SLAPP statute specifically applies to "any act...in furtherance of the...right [to] petition." (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 19; see also, *Rusheen*, *supra.* at 1056 ["Any act" includes communicative conduct such as the filing, funding, and prosecution of a civil action."].) Further, statements protected under the litigation privilege (discussed below) are "equally entitled to the benefits of section 425.16." (*Briggs v. Eden Council for Hope & Opportunity* (2009) 19 Cal.4th 1106, 1115.)

Here, Plaintiff's claim is premised wholly upon protected conduct, as it seeks to impose liability on Attorney Weaver for "advis[ing] [Mr.] Fiecther to add allegations of fraud to his legal complaint to 'bankrupt-proof' his then-future-judgment." (Complaint, ¶¶ 37, 38.) The advising of a client regarding the content of pleadings and representation of a client in litigation is prototypical protected conduct under the anti-SLAPP statute.[2] Thus, the burden shifts to Plaintiff to establish a probability of prevailing on the merits. As set forth below, Plaintiff cannot make this showing.

[2] Plaintiff may contend that Attorney Weaver cannot be protected from advising a client to include "false" allegations, as he alleged (see ¶ 38 to Complaint), but he would be wrong. As the Court explained in *Contreras v. Dowling* (2016) 5 Cal. App. 5th 394, 414, "conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage … simply because it is alleged to have been unlawful or unethical." (See also *Bergstein v. Stroock & Stroock & Lavan LLP*, (2015) 236 Cal. App. 4th 793, 805 [allegedly tortious activity "centered in defendants' role as counsel" was protected litigation activity]; *Finton Construction, Inc. v.Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 210.)

C. Plaintiffs Cannot Establish a Reasonable Probability of Success on His Claim(s) Against Attorney Weaver

Under the anti-SLAPP Statute, once a defendant shows that a lawsuit arises from protected conduct, the burden shifts to plaintiff to establish a probability that he will prevail on the claims asserted against the defendant. (*Dove Audio v. Rosenfeld Meyer & Susman* (1996) 47 Cal. App. 4th 777, 784-785.) To meet that burden, the plaintiff must produce competent, admissible evidence supporting his or her claims. (*Church of Scientology, supra*, 42 Cal.App.4th at 658.) A plaintiff cannot rely on allegations in a complaint to satisfy his burden. (*Id.* at 656.)

Although plaintiff has the burden of proof as to the probability of prevailing, evidence presented by the defendant remains relevant, as the California Supreme Court explained in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821:

> In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff ***and the defendant***. (Section 425.16, Subd. (b)(c).) Though the court does not weigh the credibility of or comparative probative strength of competing evidence, ***it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim***.

(emphasis added.)

Here, Plaintiff's claim against Attorney Weaver fails as a matter of law on at least four independent grounds: because (1) Plaintiff fails to even allege a legally cognizable claim, (2) the litigation privilege serves as an absolute bar to Plaintiff's claim, (3) Plaintiff's claim is barred by the statute of limitations set forth in Cal. Code of Civil Procedure § 340.6, and (4) Plaintiff failed to obtain pre-filing permission under Cal. Civil Code § 1714.10 relating to claims of conspiracy with a client.

1. Plaintiff Fails to State Facts Comprising an Actionable Claim Against Attorney Weaver

In addition to the substantive and procedural deficiencies detailed below, each of which prevent Plaintiff from establishing a probability of prevailing on his claim(s), Plaintiff has also failed to even present a "legally sufficient" Complaint, let alone a Complaint which can be substantiated with actual evidence. (See *Wilson, supra*, 28 Cal.4th at 821.) Of course, a plaintiff

must both "state and substantiate" a cause of action to survive an anti-SLAPP motion. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219, 1235.) But Plaintiff's Complaint does not intelligibly allege a cause of action against Attorney Weaver, nor any facts which could comprise a legally cognizable claim.

A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." (*Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678; see also *Moss v. U.S. Secret Serv.* (9th Cir. 2009) 572 F.3d 962, 969.) Yet Plaintiff's causes of action are nothing but legal recitals about "deceptive acts" or "fraud" without identifying any facts which actually indicate any other wrongdoing. Certainly, for reasons discussed above, the filing of pleadings, or advise in connection therewith, is not, itself, grounds for liability.

Put another way, the full extent of allegations against Attorney Weaver are included within paragraphs 36-38, and 67 and none of those allegations actually demonstrate any wrongdoing in anything other than conclusory terms. Discounting Plaintiff's conclusory allegations leaves the Court with nothing which can form a cause of action[3]. Thus, not only is Plaintiff's claim(s) against Attorney Weaver barred by the litigation privilege, and the statute of limitations, and lacking in substantive merit, but it also fails to even meet the threshold of alleging a claim, leaving Plaintiff with no possibility of establishing a probability of prevailing.

2. The Litigation Privilege Serves As An Absolute Bar To Plaintiff's Complaint

A publication or broadcast made in any judicial proceeding is absolutely privileged according to California law. (Cal. Civ. Code § 47(b)(2) ["A privileged publication or broadcast is one made: . . . .(b) In any . . . (2) [j]udicial proceeding. . . ."].) This "litigation privilege" affords litigants and witnesses unfettered access to the court without fear of being harassed by derivative tort actions. (*Silberg v. Anderson* (1990) 50 Cal. 3d 205.) Although originally enacted with reference to defamation, the privilege is now held applicable to any communication, whether or not it amounts to publication, **and to all torts except malicious prosecution**:

[3] Plaintiff's failure to even *plead* a claim underscores his inability to actual *substantiate* such a claim with actual evidence.

> In furtherance of the public policy purposes it is designed to serve, the **privilege described by § 47(2) has been given broad application**. Although originally enacted with reference to defamation (citations), the privilege is now held applicable to any communication, whether or not it amounts to a publication (citations), and **all torts** except malicious prosecution. (Citations.)

(*Silberg, supra*. at 211-212, emphasis added; see also *Flores v. Emerich & Fike*, 416 F. Supp. 2d 885, 900 (E.D. Cal. 2006); see also *Hagberg v. California Federal Bank FSB* (2004) 32 Cal. 4th 39.)

In *Silberg*, plaintiff argued that the litigation privilege should only apply to statements made in the furtherance of justice. The California Supreme Court rejected the application of an "interest of justice" test because such a test was "***inconsistent with the absolute nature of the litigation privilege*** and its underlying policy purposes." (Id. at p. 209; emphasis added.) The *Silberg* decision discusses the important policy concerns furthered by the litigation privilege.

> The principle purpose of § 47(2) is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by ***derivative tort actions***. (Citations.) . . . .
>
> Given the importance to our justice system of ***insuring free access to the courts***, promoting complete and truthful testimony, encouraging zealous advocacy, giving finality to judgments, and ***avoiding unending litigation***, it is not surprising that § 47(2), the litigation privilege, has been referred to as 'the backbone to an effective and smoothly operating judicial system.' (Citation.) . . . .
>
> ***To effectuate its vital purposes, the litigation privilege is held to be absolute in nature***.

(*Id.* at 213-215, emphasis added.) Along similar lines, in *Friedman v. Knecht* (1967) 248 Cal.App.2d 455, the Court of Appeal held that any doubt as to the application of the litigation privilege should be resolved in favor of the defendant.

> ***At all events, it is held that doubts are to be resolved in favor of relevancy and pertinency***; that is to say, the matter to which the privilege does not extend must be so palpably wanting in relation to the subject matter of the controversy that there can be no reasonable doubt of its impropriety. If the privilege is worth having, its purpose would be largely defeated if it were to vanish simply because one possible meaning of a statement made during judicial proceedings does not relate to them.

(emphasis added.)

The courts have accordingly given broad application to the litigation privilege. "To be privileged under subdivision 2 of §47, the matter need not be relevant, pertinent or material to any issue before the court, it only need have some connection or some relation to the judicial proceeding." (*Smith v. Hatch* (1969) 271 Cal.App.2d 39, 46.) In *Rubin v. Green* (1993) 4 Cal.4th 1187, the California Supreme Court similarly held:

> For well over a century, communications with 'some relation' to judicial proceedings have been ***absolutely immune from tort liability*** by the privilege codified as section 47 (b). At least since then-Justice Traynor's opinion in *Alberston v. Raboff* (1956) 46 Cal.2d 375, California courts have given the privilege an expansive reach. . . .
>
> In light of this extensive history, it is late in the day to contend that communications with 'some relation' to an anticipated lawsuit are not within the privilege.

(*Id.* at 1193-1194, emphasis added; see also *Flores*, 416 F. Supp. 2d at 899.) Accordingly, in *Pollock v. University of Southern California* (2003) 112 Cal. App. 4th 1416, 1430, the appellate court held that a party's perjurious declaration and personal e-mails were within the scope of the litigation privilege because they related to potential and actual litigation, despite Plaintiff's contention that both communications qualified as tortious conduct. In fact, as the Court noted in *Shafer v. Berger Kahn* (2003) 107 Cal. App. 4th 54, "[b]ecause the privilege applies without regard to malice or evil motives, it has been characterized as absolute." In *Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 39, the California Supreme Court held that a bank employee's statements to the police regarding a customer's possession of an alleged counterfeit check were absolutely privileged. Likewise, in *Herterich v. Peltner* (2018) 20 Cal.App.5th 1132, 1142, the Court noted that even committing a fraud upon the Court is protected by the litigation privilege: "While we by no means condone intentionally deceptive conduct before the courts, the litigation privilege is absolute."].)

Here, Plaintiff contends Attorney Weaver advised his client to include a "false" allegation in a complaint against him. While not true, it is ultimately immaterial as the litigation privilege would extend to Attorney Weaver even if the allegation he advised to include was false. (See Weaver Decl., ¶12; see also *Herterich*, *supra.*) Same is true for "abusing the legal process" and/or

"deceptive conduct" leading to the "resulting judgment" all of which still consist of communicative acts undertaken in direct connection with litigation. Accordingly, Plaintiff's unabashed attempt to hold Attorney Weaver liable for merely representing a client in a judicial proceeding is precisely the type of claim that is barred by the litigation privilege set forth in Civil Code § 47(b).

3. The Applicable Statute Of Limitations Bars Plaintiff's Claim, No Matter How it is Characterized

Statutes of limitations are the legislative enactments of a public policy "designed to promote justice and prevent the assertion of stale claims after the lapse of long periods of time." (*McGee v. Weinberg* (1979) 97 Cal.App.3d 798, 804.) As the United States Supreme Court explained in *Order of R. Telegraphers v. Railway Express Agency, Inc.* (1944) 321 U.S. 342, 349: "[t]he theory is that even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (See also *Duran v. St. Luke's Hospital* (2003) 114 Cal.App.4th 457 [statute of limitations strictly enforced even though plaintiff was only one day late due to $3 deficiency with court filing fee].)

Code of Civil Procedure § 340.6, subdivision (a) provides that:

> (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced **within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts giving rise to the wrongful act or omission**, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
>
> (1) The plaintiff has not sustained actual injury[;]
>
> (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred[;]
>
> (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation[;]

> (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
>
> (5) A dispute between the lawyer and client concerning fees, costs, or both is pending resolution under Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code . . .

(Emphasis added.) The enumerated tolling provisions set forth in CCP §340.6 are the **sole** grounds to toll the limitations period. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618.) In *Laird*, the Supreme Court expressly held that:

> Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, **the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute**.

(*Id.* at 618, emphasis added.)

"Based on its plain language, § 340.6 applies to all actions, except those for actual fraud, brought against an attorney 'for a wrongful act or omission' which arise 'in the performance of professional services.'" (See *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 881.) In *Vafi*, the Court of Appeal expressly rejected the assertion that §340.6 was limited to claims of malpractice by an aggrieved client:

> If the Legislature wanted to limit the reach of section 340.6 to malpractice actions between clients and attorneys, it could easily have done so. Absent express legislative intent that it meant client when it used the word plaintiff or that it meant malpractice when it referred to a wrongful act or omission, we are left only to interpret the plain meaning of the words in the statute. [Citation.] In any event, courts have consistently applied section 340.6 to various tort and contract actions.

(*Id.* at 882-83; see also, e.g., *Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 567, fn 5 [recognizing that a negligent infliction of emotional distress claim is barred by the legal malpractice statute of limitations because the limitations period applies to "all cases other than actual fraud."].)

Plaintiff's allegations assert Attorney Weaver advised his client, Mr. Fiechter to amend the underlying complaint to include fraud claims. That amended complaint was filed in 2011. (Exh. A to Graft Decl.) Moreover, the subject judgment that Plaintiff characterizes as "fraudulent" was

entered in 2015, and Plaintiff exhibited his discovery of the judgment through his failed attempt to set it aside its entry under Code of Civil Procedure § 473 in 2019. (Exhs L and M to Graft Decl.) Plaintiff unquestionably was aware of the facts constituting his claims against Attorney Weaver no later than his failed attempt to set aside the judgment he claims was procured by fraud, back in 2019. (Id.)

Any alleged actual injury also must have occurred by the time the judgment was entered and Plaintiff was unable to set it aside, again, in 2019. (Exh. M to Graft Decl.) There is also no other basis to establish tolling, whether on continuous representation grounds (Attorney Weaver having never represented Plaintiff) or either of the three other enumerated tolling bases (willful concealment only applies to the four year limitations period by its own terms, no disability is contended, nor could there have been any fee litigation, again because Attorney Weaver never represented Plaintiff).

Because Plaintiff cannot establish any basis for tolling, the statute of limitations had to commence by or before 2019 (probably well before 2015, to be sure), at the latest when Plaintiff sought to set aside the judgment unsuccessfully. Yet, Plaintiff did not file his Complaint until July 2022, years after the one-year (and also four year) statute of limitations had expired. Thus, the applicable statute of limitations also bars Plaintiff's claim against Attorney Weaver.

4. Civil Code Section 1714.10 Also Bars Plaintiff's Complaint as He Failed to Obtain Pre-Filing Authorization

Civil Code §1714.10 prohibits the filing of a claim alleging a conspiracy between an attorney and his or her client arising from any attempt to contest or compromise a claim or dispute, based upon the attorney's representation of a client, absent a pre-filing order. Absent compliance, the pleading is defective and subject to dismissal. (See also *Klotz v. Milbank, Tweed, Hadley & McCloy* (2015) 238 Cal.App.4th 1339, 1352 [finding section 1714.10 applicable to claim of conspiracy].)

In *Evans v. Pillsbury Madison & Sutro* (1998) 65 Cal.App.4th 599, 604, the court explained that:

> Section 1714.10 was intended to weed out the harassing claim of conspiracy that is so lacking in reasonable foundation as to verge on the frivolous. [Citation] The weeding tool is the requirement of prefiling approval by the court, which must be presented with a verified petition accompanied by a copy of the proposed pleading and "supporting affidavits stating the facts upon which the liability is based"; the pleading is not to be filed until the court has determined . . . the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action.

Importantly, Civil Code § 1714.10's application is not limited to expressly-pled claims of "conspiracy," but applies to any allegation that an attorney jointly participated in wrongful conduct with a client. (See *Cortese v. Sherwood* (2018) 26 Cal.App.5th 445, 455 [noting rule applies "without regard to the labels attached to the cause of action or whether the word 'conspiracy'—having no talismanic significance—appears in them" and applying Civil Code §1714.10 to claim for active participation in breach of trust].)

Here, Plaintiff's claims against Attorney Weaver falls firmly within the confines of §1714.10/agent's immunity rule. The claim is premised entirely on Attorney Weaver's conduct representing a client, Mr. Fiechter, in connection with enforcing the outstanding judgment owed by Plaintiff to Attorney Weaver's client. Section 1714.10 consequently bars the claim unless Plaintiff can establish an exception. There are only two limited exceptions to Civil Code §1714.10: (1) where the agent breaches an independent legal duty owed to the plaintiff or (2) the agent's acts go beyond the performance of a professional duty to the principal and involved a conspiracy to violate a legal duty in furtherance of the agent's personal financial gain. (See *Klotz, supra*, 238 Cal.App.4th at 1351.) Neither applies here.

V. CONCLUSION

Plaintiff's Complaint is precisely the type of suit which the anti-SLAPP statute is intended to address as Plaintiff seeks to hold Attorney Weaver liable for acts undertaken when representing a client adverse to Plaintiff. Where, as here, Plaintiff cannot show a reasonable probability of prevailing on his claim, the Court must strike the Complaint under C.C.P. §425.16, and Attorney Weaver should be deemed prevailing party.

DATED: November 16, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Alex A. Graft*
ALEX A. GRAFT
Attorneys for Defendant
ROBERT N. WEAVER, ESQ.